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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 DAVID GALLEGOS, )  
7 Plaintiff, ) No. CV-09-5076-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

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13 BEFORE THE COURT are cross-motions for summary judgment noted  
14 for hearing without oral argument on November 5, 2010 (Ct. Rec.  
15 24, 26). Attorney D. James Tree represents Plaintiff; Special  
16 Assistant United States Attorney Richard M. Rodriguez represents  
17 the Commissioner of Social Security (Commissioner). The parties  
18 have consented to proceed before a magistrate judge (Ct. Rec. 9).  
19 After reviewing the administrative record and the briefs filed by  
20 the parties, the court **GRANTS** Defendant's Motion for Summary  
21 Judgment (Ct. Rec. 26) and **DENIES** Plaintiff's Motion for Summary  
22 Judgment (Ct. Rec. 24).

23 **JURISDICTION**

24 Plaintiff protectively filed applications for disability  
25 insurance benefits (DIB) and supplemental security income (SSI) on  
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1 March 26, 2004<sup>1</sup>, alleging disability beginning October 10, 2002,  
2 due to back, shoulder, neck and hip problems, diabetes, lifting  
3 limitations, sleep problems and depression (Tr. 52-53, 72-74, 104,  
4 128, 153, 663E-663G). The application was denied initially and on  
5 reconsideration (Tr. 55-58, 59-62, 64-67, 663A-663B).

6 At a hearing before Administrative Law Judge (ALJ) Paul L.  
7 Gaughen on April 2, 2007, plaintiff, represented by counsel, and  
8 vocational expert (VE) Daniel McKinney testified (Tr. 640-662). On  
9 April 18, 2007, the ALJ issued an unfavorable decision (Tr. 15-  
10 28). The Appeals Council denied Mr. Gallegos's request for review  
11 on June 28, 2009 (Tr. 5-8). Therefore, the ALJ's decision became  
12 the final decision of the Commissioner, which is appealable to the  
13 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
14 this action for judicial review pursuant to 42 U.S.C. § 405(g) on  
15 September 21, 2009 (Ct. Rec. 1, 6).

#### 16 STATEMENT OF FACTS

17 The facts have been presented in the administrative hearing  
18 transcript, the ALJ's decision, the briefs of both plaintiff and  
19 the Commissioner, and are briefly summarized here.

20 Plaintiff was 42 years old at onset (Tr. 645). He has a  
21 fourth or fifth grade education (Tr. 110, 159, 330, 645). Mr.  
22 Gallegos has worked as a food processing laborer, nurse's aid,  
23 janitor, and in the produce department of a grocery store (Tr.  
24 105, 145, 154).

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26 <sup>1</sup>The current applications were consolidated with a prior  
27 application filed April 18, 2003, after the ALJ granted  
28 plaintiff's counsel's request to reopen the earlier application  
(Tr. 15, 642).

1 Plaintiff has a driver's license and drives (Tr. 166-167).  
2 He testified he is not participating in mental health treatment  
3 but takes psychotropic medication (Tr. 650). He can sit one hour  
4 and stand 30 minutes, although at times he can only stand five  
5 minutes (Tr. 651-652). Plaintiff works part-time, 14 hours a week,  
6 as a post office janitor. He has to lie down after work for 2 to 6  
7 hours (Tr. 652-653). His job involves sweeping, dusting, and  
8 cleaning restrooms (Tr. 653). He cannot work full time because he  
9 feels dizzy and can only lift 20 pounds (Tr. 654).

#### 10 SEQUENTIAL EVALUATION PROCESS

11 The Social Security Act (the Act) defines disability as the  
12 "inability to engage in any substantial gainful activity by reason  
13 of any medically determinable physical or mental impairment which  
14 can be expected to result in death or which has lasted or can be  
15 expected to last for a continuous period of not less than twelve  
16 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
17 provides that a plaintiff shall be determined to be under a  
18 disability only if any impairments are of such severity that a  
19 plaintiff is not only unable to do previous work but cannot,  
20 considering plaintiff's age, education and work experiences,  
21 engage in any other substantial gainful work which exists in the  
22 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,  
23 the definition of disability consists of both medical and  
24 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
25 (9<sup>th</sup> Cir. 2001).

26 The Commissioner has established a five-step sequential  
27 evaluation process for determining whether a person is disabled.  
28 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person

1 is engaged in substantial gainful activities. If so, benefits are  
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not,  
3 the decision maker proceeds to step two, which determines whether  
4 plaintiff has a medically severe impairment or combination of  
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

6 If plaintiff does not have a severe impairment or combination  
7 of impairments, the disability claim is denied. If the impairment  
8 is severe, the evaluation proceeds to the third step, which  
9 compares plaintiff's impairment with a number of listed  
10 impairments acknowledged by the Commissioner to be so severe as to  
11 preclude substantial gainful activity. 20 C.F.R. §§  
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
13 App. 1. If the impairment meets or equals one of the listed  
14 impairments, plaintiff is conclusively presumed to be disabled. If  
15 the impairment is not one conclusively presumed to be disabling,  
16 the evaluation proceeds to the fourth step, which determines  
17 whether the impairment prevents plaintiff from performing work  
18 which was performed in the past. If a plaintiff is able to perform  
19 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
20 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's  
21 residual functional capacity ("RFC") assessment is considered. If  
22 plaintiff cannot perform this work, the fifth and final step in  
23 the process determines whether plaintiff is able to perform other  
24 work in the national economy in view of plaintiff's residual  
25 functional capacity, age, education and past work experience. 20  
26 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,  
27 482 U.S. 137 (1987).

28 The initial burden of proof rests upon plaintiff to establish

1 a *prima facie* case of entitlement to disability benefits.  
2 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
3 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
4 met once plaintiff establishes that a physical or mental  
5 impairment prevents the performance of previous work. The burden  
6 then shifts, at step five, to the Commissioner to show that (1)  
7 plaintiff can perform other substantial gainful activity and (2) a  
8 "significant number of jobs exist in the national economy" which  
9 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
10 Cir. 1984).

#### 11 STANDARD OF REVIEW

12 Congress has provided a limited scope of judicial review of a  
13 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
14 the Commissioner's decision, made through an ALJ, when the  
15 determination is not based on legal error and is supported by  
16 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
17 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
18 "The [Commissioner's] determination that a plaintiff is not  
19 disabled will be upheld if the findings of fact are supported by  
20 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
21 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is  
22 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
23 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
24 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
25 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
26 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
27 evidence as a reasonable mind might accept as adequate to support  
28 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)

(citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### ALJ'S FINDINGS

At the outset, the ALJ found plaintiff met the DIB requirements and was insured through December 31, 2007 (Tr. 16, 18). At step one ALJ Gaughen found although plaintiff engaged in significant part-time work, he has not engaged in substantial gainful activity since onset (Tr. 17). At steps two and three, the ALJ found plaintiff suffers from diabetes, right shoulder

1 impairment, and degenerative spinal changes at C4-5 and C5-6,  
2 impairments that are severe but which do not alone or in  
3 combination meet or medically equal a Listed impairment (Tr. 18,  
4 24). The ALJ found plaintiff less than completely credible (Tr.  
5 26-27). At step four, he found plaintiff's RFC for a wide range of  
6 light work enables him to perform his past job as a cannery worker  
7 (Tr. 27). The ALJ found plaintiff is not disabled as defined by  
8 the Social Security Act (Tr. 27-28).

#### 9 ISSUES

10 Plaintiff contends the Commissioner erred as a matter of law  
11 by (1) improperly weigh the medical evidence, including evidence  
12 of depression, the opinions of treating doctor Benjamin Rodriguez,  
13 M.D. (Tr. 556, 566), examining doctor David Woolever, M.D. (Tr.  
14 369), a treating doctor whose name is illegible (at Tr. 568-569),  
15 and treating doctor Robert Johnson, D.O.; (2) improperly assessing  
16 credibility ; and (3) performing an inadequate step four analysis  
17 (Ct. Rec. 25 at 4-20). Asserting the ALJ's decision is supported  
18 by substantial evidence and free of harmful legal error, the  
19 Commissioner asks the Court to affirm (Ct. Rec. 27 at 6).

#### 20 DISCUSSION

##### 21 A. Weighing medical evidence

22 In social security proceedings, the claimant must prove the  
23 existence of a physical or mental impairment by providing medical  
24 evidence consisting of signs, symptoms, and laboratory findings;  
25 the claimant's own statement of symptoms alone will not suffice.  
26 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
27 on the basis of a medically determinable impairment which can be  
28 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once

1 medical evidence of an underlying impairment has been shown,  
2 medical findings are not required to support the alleged severity  
3 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
4 1991)(en banc).

5 A treating physician's opinion is given special weight  
6 because of familiarity with the claimant and the claimant's  
7 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
8 1989). However, the treating physician's opinion is not  
9 "necessarily conclusive as to either a physical condition or the  
10 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
11 751(9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
12 treating physician than an examining physician. *Lester v. Chater*,  
13 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
14 given to the opinions of treating and examining physicians than to  
15 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
16 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
17 are not contradicted, they can be rejected only with clear and  
18 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
19 ALJ may reject an opinion if he states specific, legitimate  
20 reasons that are supported by substantial evidence. See *Flaten v.*  
21 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
22 1995).

23 In addition to the testimony of a nonexamining medical  
24 advisor, the ALJ must have other evidence to support a decision to  
25 reject the opinion of a treating physician, such as laboratory  
26 test results, contrary reports from examining physicians, and  
27 testimony from the claimant that was inconsistent with the  
28 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d at



1 751-752; *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup> Cir. 1995).

2 In order to be entitled to benefits, the plaintiff must have  
3 an impairment severe enough to significantly limit the physical or  
4 mental ability to do basic work activities. See 20 C.F.R. §§  
5 404.1520(c), 416.920(c). An impairment, or combination of  
6 impairments, can only be found to be non-severe if the evidence  
7 establishes a slight abnormality that has no more than a minimal  
8 effect on an individual's ability to work. See *Yuckert v. Bowen*,  
9 841 F.2d 303, 306 (9<sup>th</sup> Cir. 1988); Social Security Ruling (SSR)  
10 85-28. The plaintiff has the burden of establishing the severity  
11 of the impairment by providing medical evidence consisting of  
12 signs, symptoms, and laboratory findings. See 20 C.F.R. §§ 404-  
13 1508, 416.908. The plaintiff's own statement of symptoms alone is  
14 insufficient. See *id.* The question on review is whether the ALJ  
15 had substantial evidence to find that the medical evidence clearly  
16 established that the claimant did not have a medically severe  
17 impairment or combination of impairments. *Webb v. Barnhart*, 433  
18 F.3d 683, 687 (9<sup>th</sup> Cir. 2005).

19 Plaintiff testified he currently worked part-time (14 hours  
20 per week) as a post office janitor, a job he held for about  
21 fourteen months prior to the hearing [at less than SGA levels](Tr.  
22 653). The ALJ points out at times during the relevant period Mr.  
23 Gallegos attended classes 4 hours a day, five days a week (Tr. 26,  
24 Exhibits 9E, 13E, 14E, 17F/4). Plaintiff testified he suffered  
25 from depression for about seven years, since 2000, yet he worked  
26 full time until onset in October 2002. The ALJ observes plaintiff  
27 testified he takes medication but is not receiving mental health  
28 treatment; in May 2003 he told examiner Dr. Woolever he had no

1 psychiatric problems (Tr. 20, 24, 26; Exhibits 14F, 15F).

2 The ALJ considered this evidence when he weighed all of the  
3 opinion evidence.

4 **B. Evidence of mental impairment**

5 Plaintiff alleges the ALJ would have found Mr. Gallegos's  
6 depression severe at step two if he properly weighed the opinions  
7 of treating and examining professionals (Ct. Rec. 25 at 6-11). The  
8 Commissioner asserts the ALJ's reasoning is legally sound and  
9 supported by the evidence (Ct. Rec. 27 at 8-10).

10 The ALJ considered an assessed GAF of 62 on January 28, 2003,  
11 three months after onset, indicates only mild symptoms or  
12 limitations (Tr. 24, referring to Tr. 288). Plaintiff alleges the  
13 ALJ should have accepted the results of other assessments  
14 indicating greater limitations, such as the one performed by  
15 examining Dr. Michels in June 2004 (Tr. 530) when he assessed a  
16 GAF of 45-50, indicating serious symptoms or impairment.

17 To further aid in weighing the conflicting medical evidence,  
18 the ALJ evaluated plaintiff's credibility and found him less than  
19 fully credible (Tr. 26-27). Credibility determinations bear on  
20 evaluations of medical evidence when an ALJ is presented with  
21 conflicting medical opinions or inconsistency between a claimant's  
22 subjective complaints and diagnosed condition. See *Webb v.*  
23 *Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

24 It is the province of the ALJ to make credibility  
25 determinations. *Andrews v. Shalala*, 53 F.3d at 1035. However, the  
26 ALJ's findings must be supported by specific cogent reasons.  
27 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Once the  
28 claimant produces medical evidence of an underlying medical

1 impairment, the ALJ may not discredit testimony as to the severity  
2 of an impairment because it is unsupported by medical evidence.  
3 *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent  
4 affirmative evidence of malingering, the ALJ's reasons for  
5 rejecting the claimant's testimony must be "clear and convincing."  
6 *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General  
7 findings are insufficient: rather the ALJ must identify what  
8 testimony not credible and what evidence undermines the claimant's  
9 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d  
10 915, 918 (9<sup>th</sup> Cir. 1993).

11 Four factors the ALJ relied on when he assessed credibility  
12 include: (1) activity levels incompatible with the degree of  
13 impairment alleged; (2) lack of mental health treatment; (3)  
14 symptoms controlled with medication; and (4) inconsistent  
15 statements, and vague or unresponsive testimony regarding  
16 treatment with Robert Johnson, D.O. (Tr. 24, 26-27).

17 The record supports the ALJ's reasons.

18 Plaintiff's activities indicate an ability to perform work  
19 like activities. During the relevant period of October 10, 2002,  
20 through the ALJ's April 18, 2007 decision, plaintiff's activities  
21 have included working part-time (14 hours a week) as a janitor, as  
22 noted, and attending school four hours a day, five days a week<sup>2</sup>.  
23 The ALJ points out plaintiff's reports indicate he swims, drives,  
24 shops three days a week (for an hour each time), rakes leaves, and  
25 attends church (Tr. 26, 204, 331). Attending school alone is an  
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28 <sup>2</sup>In April 2006 plaintiff indicated he attended classes five  
days a week for six hours a day, but missed some classes due to  
back pain (Tr. 630).

1 activity which is inconsistent with an alleged inability to  
2 perform work. *Matthews v. Shalala*, 10 F.3d 678, 680 (9<sup>th</sup> Cir.  
3 1993). Plaintiff's argument the ALJ unfairly penalizes plaintiff  
4 for trying to live a normal life is unavailing. The ALJ's  
5 interpretation of these activities may not be the only reasonable  
6 one. But it is a reasonable interpretation and is supported by  
7 substantial evidence; accordingly, it is not the Court's role to  
8 second-guess it. *Rollins v. Massanari*, 261 F.3d 853, 857 (9<sup>th</sup> Cir.  
9 2001), citing *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989).

10 The ALJ is correct plaintiff has inconsistently sought mental  
11 health treatment for allegedly disabling limitations. Mr. Gallegos  
12 testified he is not receiving mental health treatment. The record  
13 shows he returned to mental health in January 2003 to restart  
14 prescribed zoloft (Exhibit 5F), meaning he stopped seeking  
15 services and taking medication. In June 2004, Dr. Michels notes  
16 plaintiff is not currently involved in any mental health treatment  
17 (Exhibit 17F), as the ALJ points out (Tr. 19, 24). An unexplained,  
18 or inadequately explained, failure to seek treatment or follow a  
19 prescribed course of treatment can cast doubt on a complainant's  
20 sincerity. *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989).

21 The ALJ observes in September 2003 (eleven months after  
22 onset), plaintiff told examining psychiatrist Dr. Lyster he took  
23 zoloft off and on for about seven years and found it helpful (Tr.  
24 20-21), indicating his depression improves on medication (Tr. 24;  
25 Exhibit 9F). As noted, plaintiff went to mental health services to  
26 restart medication, another indication he found it helpful. In  
27 September 2004, the ALJ notes plaintiff told the health clinic he  
28 was taking lexapro for depression and doing well (Tr. 22).

1 Although Mr. Gallegos made contrary statements, it is the ALJ's  
2 responsibility, not the Court's, to resolve conflicts in the  
3 evidence. *Richardson*, 402 U.S. at 400. The ALJ could properly rely  
4 on plaintiff's statements medication treated his depression  
5 effectively as a factor casting doubt on plaintiff's assertions of  
6 disabling impairment due to depression. See *Warre v. Comm'r of*  
7 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006)(impairments  
8 that can be controlled effectively with medication are not  
9 disabling for the purpose of determining eligibility for  
10 benefits).

11 Plaintiff's reports to the SSA and to medical professionals  
12 differ from his testimony, as the ALJ observes (Tr. 26). Mr.  
13 Gallegos testified he can sit for one hour and stand for 30  
14 minutes. About a year after onset plaintiff reported he could sit  
15 for two hours and 15 minutes (Tr. 204). Mr. Gallegos testified he  
16 works as a janitor 14 hours a week and has done so for 14 months,  
17 an indication he is not as limited as alleged. Plaintiff reported  
18 to the SSA directly or to medical professionals he drove his  
19 children to and from school; shopped three times a week for an  
20 hour each time; raked leaves; used public transportation; cooked;  
21 did laundry, and attended church throughout the relevant period  
22 (Tr. 26; Exhibits 9E, 13E, 14E, 9F, 17F, Tr. 331). The ALJ  
23 appropriately relied on plaintiff's inconsistent statements when  
24 he assessed credibility. *Thomas v. Barnhart*, 278 F.3d 947, 958-959  
25 (9<sup>th</sup> Cir. 2002)(proper factors include inconsistencies in  
26 plaintiff's statements inconsistencies between statements and  
27 conduct, and extent of daily activities).

28 Moreover, the ALJ opines plaintiff was less than forthright

1 ("vague and essentially non-responsive") when questioned about the  
2 frequency of his treatment with Robert Johnson, D.O. (Tr. 24).  
3 Plaintiff testified he saw Dr. Johnson every three months until  
4 the doctor left; sometimes Mr. Gallegos forgot and missed an  
5 appointment; plaintiff stopped seeing Dr. Johnson for a long time  
6 when he [plaintiff] was in California, and then Mr. Gallegos saw  
7 another psychologist in Washington recently (Tr. 655-656).

8 The ALJ's reasons for finding plaintiff less than fully  
9 credible are clear, convincing, and fully supported by the record.

10 In support of his step two argument, plaintiff alleges the  
11 ALJ failed to credit the opinion of treating doctor James Ethier,  
12 M.D. (Ct. Rec. 25 at 7). The first record plaintiff cites is  
13 outside the relevant period, eight days before onset. Dr. Ethier  
14 diagnosed major depressive disorder with marked features of  
15 agitation, and added a second prescribed psychotropic medication  
16 (Tr. 276-277). Next plaintiff quotes at length Dr. Ethier's  
17 earlier report (again before onset, pertaining to a September 16,  
18 2002 appointment)(Tr. 278). In addition to being outside the  
19 relevant period, the quoted portion of the report in essence lists  
20 plaintiff's reported symptoms. An ALJ is not required to credit  
21 opinions based on a claimant's unreliable self-reporting. *Bayliss*  
22 *v. Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup> Cir. 2005). Significantly,  
23 as noted by ALJ Gaughen, plaintiff was employed full time when Dr.  
24 Ethier gave his assessment (Tr. 18).

25 Plaintiff alleges the ALJ failed to properly weigh the  
26 opinion of examining psychiatrist M. Christine Lyster, M.D. (Tr.  
27 328-334), rendered about eleven months after onset (Ct. Rec. 25 at  
28 8). She found plaintiff's mood is depressed. His intellect is

1 average (Tr. 332). Dr. Lyster diagnosed depressive disorder NOS  
2 and a current GAF of 57, indicating moderate symptoms or  
3 limitations (Tr. 333). However, she opined plaintiff is able to  
4 perform work activities without special or additional supervision  
5 (Tr. 333). She assessed a single, mild limitation in plaintiff's  
6 ability to withstand the stress and pressures associated with a  
7 normal work environment and day-to-day work activities (Tr. 333).  
8 Her RFC is consistent with the ALJ's findings.

9 Plaintiff alleges the ALJ improperly weighed the June 22,  
10 2004 opinion (about 20 months after onset) of examining  
11 psychiatrist Paul Michels, M.D. (Tr. 526-530)(Ct. Rec. 25 at 8-9).  
12 The ALJ observes plaintiff was not involved in any mental health  
13 treatment when he was evaluated by Dr. Michels (Tr. 22, 527).  
14 Plaintiff does laundry, cooks, shops for groceries, swims to  
15 relieve pain 2-3 times a week, and occasionally has contact with a  
16 couple of friends (Tr. 529). He also reported he only eats, sleeps  
17 and goes to medical appointments (Tr. 527). Dr. Michels diagnosed  
18 adjustment disorder with depressed mood and assessed a GAF of 45-  
19 50, indicating serious symptoms or limitations (Tr. 529). He  
20 assessed specific moderate to severe limitations. The ALJ rejected  
21 Dr. Michels's opinion because it appeared to be based on  
22 plaintiff's unreliable self-reported limitations, and it is  
23 inconsistent with plaintiff's reported daily activities (Tr. 24).  
24 Both are proper reasons to reject an examining doctor's  
25 contradicted opinion.

26 Plaintiff asserts the ALJ erred when he weighed the opinion  
27 of Robert Johnson, D.O., who treated plaintiff "some years ago"  
28 and saw him again on June 13, 2005 (Tr. 623-625)(Ct. Rec. 25 at 9-

11). Dr. Johnson notes plaintiff had been back in Washington state for a year; Dr. Benjamin Rodriguez is his primary care provider (PCP), and he prescribes plaintiff's psychotropic medications, lexapro and amitriptyline. Dr. Johnson diagnosed depressive disorder NOS and assessed a GAF of 50. He added a different antidepressant (Tr. 623-625). In December 2006 Dr. Johnson wanted to stop one antidepressant and increase another (Tr. 607). He assessed seven moderate limitations (Tr. 602-604). The ALJ rejected this opinion due to the lack of treatment notes, testing procedures or other supporting documentary evidence (Tr. 24). The ALJ's reason is specific and legitimate. When evaluating conflicting medical opinions, an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory, and inadequately supported by clinical findings. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001). Moreover, two months later Dr. Johnson assessed a GAF of 70 indicating only mild symptoms or limitations (Tr. 606), apparently due to the change in medication.

The ALJ gave specific, legitimate reasons supported by substantial evidence for rejecting the contradicted opinions of some treating and examining professionals.

### **C. Evidence of physical impairment**

Plaintiff alleges the ALJ erred when he weighed the contradicted opinions of examiner David Woolever, M.D. (Tr. 369), a treating doctor with an illegible signature<sup>3</sup> (Tr. 568-569), and

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<sup>3</sup>The report dated October 22, 2006, is by Dr. French (Tr. 568-569). He has not seen plaintiff in six months. Dr. French saw him June 22, 2005 and April 21, 2006 (Tr. 568). Plaintiff can perform no more than "light duty" (Tr. 569), an opinion the ALJ considered, contrary to plaintiff's argument (Tr. 23, citing Exhibit 24F at Tr. 568-569).



1 treating doctor Benjamin Rodriguez, M.D. (556, 566)(Ct. Rec. 25 at  
2 12-14).

3 Dr. Woolever examined plaintiff in May 2003 (Tr. 367-370) and  
4 2004 (Tr. 571-572). In 2003, seven months after onset, Dr.  
5 Woolever opined plaintiff could perform light work, as the ALJ  
6 points out (Tr. 20, 372). He made the same assessment in April  
7 2004, adding plaintiff should lift only 20 pounds, sit no more  
8 than one hour, and limit walking and climbing (Tr. 21, 369).

9 The ALJ considered the opinion of James Johnson, M.D., who  
10 treated plaintiff July 1, 2003 (Tr. 26, 306), nine months after  
11 onset. He assessed chronic lumbar and cervical pain and released  
12 plaintiff to return to work on July 7, 2003 (Tr. 306).

13 The ALJ considered the April and October 2006 opinion of  
14 examining orthopedist H. Graeme French, M.D., that plaintiff could  
15 perform light work (Tr. 23, 26, Exhibits 24F, 25F).

16 The ALJ considered the opinion of James Opara, M.D., who  
17 treated plaintiff both long before onset (1998) and after  
18 (December 2002, May 2003)(Tr. 18-20, Exhibit 15F, Tr. 457),  
19 primarily for diabetes and medication for depression. The ALJ  
20 notes in June 2003 plaintiff asked Dr. Opara to fill out paperwork  
21 for unemployment and social security disability (Tr. 20), a  
22 request the doctor declined (Tr. 20, 26). The ALJ indicates if  
23 plaintiff was applying for unemployment benefits, he would be  
24 required to certify he is able to work (Tr. 26-27), contrary to  
25 his statements in support of the applications for SSI and DIB  
26 benefits.

27 While the receipt of unemployment benefits can undermine a  
28 clamant's alleged inability to work full-time, *see Copeland v.*

1 Bowen, 861 F.2d 536, 542 (9<sup>th</sup> Cir. 1998), the record here does not  
2 establish whether plaintiff held himself out as available for  
3 full-time or part-time work. Accordingly, this basis for the ALJ's  
4 credibility finding is not supported by substantial evidence. See  
5 *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161-1162  
6 (9<sup>th</sup> Cir. 2008). To the extent the ALJ relied on this when he  
7 weighed the evidence, it appears to be error. In light of the  
8 ALJ's remaining clear and convincing reasons, the error appears  
9 harmless as it is unlikely the decision would differ without the  
10 error.

11 In April 2004 Dr. Opara diagnosed degenerative disc disease  
12 (DDD) of the cervical, thoracic and lumbar spines. He prescribed  
13 celebrex (Tr. 22, Exhibit 15F). Throughout the relevant period  
14 (aside from diabetes medication), plaintiff has been prescribed  
15 tylenol, occasionally celebrex or feldene, steroid injections, and  
16 physical therapy for his physical complaints (see e.g., Tr. 380,  
17 520, 556, 572, 579). A conservative course of treatment can  
18 undermine allegations of debilitating pain. See *Carmickle*, 533  
19 F.3d at 1162.

20 The ALJ considered the opinion of Benjamin Rodriguez, M.D.,  
21 who began treating plaintiff in 1995 (Tr. 23, 27, 469, Exhibits  
22 21F, 23F, 26F). In December 2004 he diagnosed a bulging disc and  
23 degenerative joint disease, and continued plaintiff on celebrex  
24 (Tr. 556). By April 2006, Dr. Rodriguez opined plaintiff's  
25 depression, and pain in his shoulders and back, limit him to  
26 sedentary work (Tr. 566). The ALJ rejected the RFC for sedentary  
27 work because it is contradicted "by the bulk of the record" which  
28 indicates plaintiff is capable of light exertion (Tr. 27). Based

1 on the record in this case, the ALJ's reason is specific,  
2 legitimate and supported by substantial evidence.

3 The ALJ's reasons for rejecting some of the examining and  
4 treating doctors' contradicted opinions are specific, legitimate  
5 and supported by substantial evidence.

6 **D. Step Four**

7 Plaintiff asserts the ALJ erred at step four (Ct. Rec. 25 at  
8 17-20) by failing to (1) include all of his limitations in the  
9 hypothetical; (2) identify any of the specific demands of his past  
10 relevant work, and (3) "make proper findings as to how he  
11 concluded that Mr. Gallegos could return to his past occupation of  
12 cannery worker" (Ct. Rec. 25 at 18-20). The Commissioner answers  
13 the ALJ complied with the requirements of SSR 82-62, and plaintiff  
14 failed to meet his step four burden of showing he is unable to  
15 perform any past relevant work (Ct. Rec. 27 at 16-19).

16 The Commissioner is correct. The ALJ properly found at step  
17 four, relying on the VE's testimony, plaintiff is able to perform  
18 his past job as a cannery worker.

19 The ALJ is responsible for reviewing the evidence and  
20 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
21 *Bowen*, 881 F.2d at 751 (9<sup>th</sup> Cir. 1989). It is the role of the trier  
22 of fact, not this court, to resolve conflicts in evidence.  
23 *Richardson*, 402 U.S. at 400. The court has a limited role in  
24 determining whether the ALJ's decision is supported by substantial  
25 evidence and may not substitute its own judgment for that of the  
26 ALJ, even if it might justifiably have reached a different result  
27 upon de novo review. 42 U.S.C. § 405 (g).

28 After review the Court finds the ALJ's assessment of all of

1 the evidence is supported by the record and free of harmful legal  
2 error.

**CONCLUSION**

3 Having reviewed the record and the ALJ's conclusions, this  
4 Court finds the ALJ's decision is free of legal error and  
5 supported by substantial evidence..

6 **IT IS ORDERED:**

7 1. Defendant's motion for summary judgment (**Ct. Rec. 26**) is  
8 **granted.**

9 2. Plaintiff's motion for summary judgment (**Ct. Rec. 24**) is  
10 **denied.**

11 The District Court Executive is directed to file this Order,  
12 provide copies to counsel for plaintiff and defendant, enter  
13 judgment in favor of defendant, and **CLOSE** this file.

14 DATED this 15th day of October, 2010.

15  
16 s/ James P. Hutton

JAMES P. HUTTON

17 UNITED STATES MAGISTRATE JUDGE  
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